(3)

No. 90-965

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALVY T. MCQUEEN, PETITIONER

v.

COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had jurisdiction to grant injunctive and monetary relief against the United States with respect to an alleged violation by government agents of Rule 6(e) of the Federal Rules of Criminal Procedure.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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UNITED STATES OF AMERICA,
and COMPTROLLER OF PUBLIC ACCOUNTS

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OPINIONS BELOW

The opinion of the court of appeals in these consolidated cases (Pet. App. 1a-16a) is reported at 907 F.2d 1544. The orders of the United States District Court for the Western District of Texas in *McQueen* v. *Bullock* (Pet. App. 20a-25a) and of the United States District Court for the Southern District of Texas in *McQueen* v. *United States* (Pet. App. 26a-27a) are not reported.

JURISDICTION

The judgments of the court of appeals were entered on August 9, 1990. A petition for rehearing was denied on September 14, 1990. Pet. App. 17a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in the business of distributing motor fuels in the State of Texas. The United States and the State of Texas have been conducting investigations into petitioner's failure to pay state and federal motor fuel excise taxes. Internal Revenue Service Special Agent Mark Hughes was part of the federal task force investigating industry-wide motor fuel excise tax evasion and was also assigned to assist an attorney for the government in the conduct of certain federal grand jury investigations in the Southern District of Texas.[1] In June of 1988, Hughes was informed that petitioner was removing business records from his office to prevent their examination. Hughes obtained a search warrant and successfully seized the records petitioner had removed. Theretofore, petitioner had not been a target of the grand jury investigation.[2] Shortly thereafter, however, a grand jury investigation of petitioner was commenced. Pet. 4-5.

2. In September of 1988, Special Agent Hughes permitted agents of the Comptroller of the State of Texas to examine and copy the documents that had been seized under the search warrant. The Comptroller used that information to assess motor fuel excise taxes against petitioner.[3]

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[1] See C.A. Doc. 9, Exh. 19; Doc. 23, at 1. "Doc." references are to the documents in the original record in the court of appeals in *McQueen v. United States*, as numbered by the clerk of the district court.

[2] Doc. 22, at 1; Doc. 23.

[3] Doc. 9, Exh. 19.

Certain of petitioner's assets were thereafter seized by the Comptroller to satisfy the assessments. Pet. 6.

3. Petitioner then instituted two actions in the federal courts. In the first action (*McQueen* v. *Bullock*), brought in the United States District Court for the Western District of Texas, petitioner sought a return of the property seized by the Comptroller and an injunction against further assessments without providing petitioner a pre-deprivation hearing. Pet. App. 28a-36a. The district court found that the relief requested by petitioner was barred by the Tax Anti-Injunction Act (28 U.S.C. 1341) and therefore dismissed the action. Pet. App. 22a, 25a.

4. In the second suit (*McQueen* v. *United States*), petitioner alleged (Pet. App. 37a) that the state assessments were based upon information obtained by a federal grand jury and provided to the State in violation of Rule 6(e) of the Federal Rules of Criminal Procedure, which prohibits (in the absence of a court order) certain disclosures of "matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(2). In petitioner's view (Pet. 5), the seized records were "matters occurring before the grand jury" merely because Hughes had been assigned to assist the attorney for the government in the conduct of the industry-wide investigation. Since there had been no order authorizing the disclosure of the seized materials to the State authorities, petitioner contended that the disclosure violated Rule 6(e). Accordingly, petitioner asked the United States District Court for the Southern District of Texas to enjoin the United States from further disclosures of grand jury material, to require the Comptroller and the United States to return all grand jury materials to the grand jury, and to assess against the United States and the Comptroller actual and punitive damages for the improper disclosure of the grand jury material. Pet. App. 41a. The district court held that the materials disclosed to the Comptroller did not fall within

the scope of "matters occurring before the grand jury" and, accordingly, dismissed the complaint for failure to state a cause of action. Pet. App. 26a-27a.

5. The court of appeals consolidated the appeals and affirmed both orders. In *McQueen* v. *Bullock*, the court held that petitioner had a "vast arsenal" under Texas law to challenge the assessments against him and that, therefore, Texas provided remedies that are " 'plain,' 'speedy,' and 'efficient.'" Pet. App. 12a. The Tax Anti-Injunction Act, by its express terms, therefore barred the federal courts from considering his claims. *Ibid.* In *McQueen* v. *United States*, the court concluded that the suit must be dismissed under the doctrine of sovereign immunity because the United States had not consented to be sued for violations of Rule 6(e). Pet. App. 14a. Noting that the proper remedy for violations of Rule 6(e) is to punish or discipline the individuals responsible for breaches of grand jury secrecy (Pet. App. 14a-15a), the court ruled that, in suing the United States, petitioner "had opted for a procedure and for relief which is not available to him." *Ibid.*

ARGUMENT

The United States was not a party to the proceedings in *McQueen* v. *Bullock* in either the district court or the court of appeals. Accordingly, this response is limited to the petition for certiorari in *McQueen* v. *United States*.

1. The holding of the court of appeals that sovereign immunity barred petitioner's suit against the United States for monetary damages and injunctive relief is correct, and does not conflict with the decision of any other court. As the court of appeals concluded (Pet. App. 14a-15a), the nondisclosure provisions of Rule 6(e) create no private right of action against the United States; instead, the Rule is to be enforced by sanctions directed to the individual attorneys

and agents involved in the grand jury proceedings. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988); *Barry* v. *United States*, 865 F.2d 1317, 1321-1322 (D.C. Cir. 1989); *Blalock* v. *United States*, 844 F.2d 1546, 1551 (11th Cir. 1988); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 214 (5th Cir. 1980); *United States* v. *Dunham Concrete Products, Inc.*, 475 F.2d 1241, 1248 (5th Cir. 1973).[4]

The "plain language" of the Rule (*United States* v. *John Doe, Inc. I*, 481 U.S. 102, 109 (1987)) mandates this conclusion. By its terms, Rule 6(e) imposes an obligation of secrecy only on those individuals involved in the investigation: grand jurors, stenographers, attorneys for the government and agents assisting the attorneys for the government. The Rule further specifies that "[n]o obligation of secrecy may be imposed on any other person except in accordance with these rules." Fed. R. Crim. P. 6(e)(2). Nothing in the Rule indicates that it was intended to provide a waiver of sovereign immunity that would allow damage suits and actions for injunction to proceed directly against the United States for violations of its terms.

Contrary to petitioner's contentions (Pet. 11, 14-15), the supervisory powers of district courts over grand juries have never been thought to provide a grand jury target a private right of action against the United States. No case has held that a district court's supervisory authority over grand juries confers upon it jurisdiction to award damages and to enter injunctions against the United States. As this Court has noted in a different context, violations of Rule 6(e) are remedied by focusing "on the culpable individual rather than

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[4] Petitioner (Pet. 15, 19-20) has read too much into the caption of these court of appeals cases. Even though the nominal party in each was the United States, the relief sought by the complainant in each case was directed to the individuals involved in conducting the investigation. *E.g.*, *Barry* v. *United States*, 865 F.2d at 1319; *In re Grand Jury Investigation (Lance)*, 610 F.2d at 609.

granting a windfall to the unprejudiced defendant." *Bank of Nova Scotia* v. *United States*, 487 U.S. at 263. While the district court may discipline and sanction an offending individual, direct monetary or injunctive relief against the United States is not available under Rule 6(e). See *Blalock* v. *United States*, 844 F.2d at 1561; *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1204-1206 (E.D. Mich. 1990).

Petitioner is mistaken in asserting (Pet. 14) that this Court's decision in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), authorizes relief directly against the United States as a remedy for violations of Rule 6(e). *Sells* was not a suit against the United States. To the contrary, in *Sells*, the Department of Justice Civil Division applied to the district court for an order authorizing an automatic right of access to grand jury materials for the civil attorneys of the Department. This Court held that disclosure to the government's civil attorneys of "matters occurring before a grand jury" may be made only upon a showing of particularized need to gain access to those materials. In defining the requirements that must be met in order to obtain disclosure of grand jury materials in *Sells*, this Court did not suggest that the district court had jurisdiction over the United States in a private action for damages or other relief for a breach of grand jury secrecy.[5]

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[5] The cases upon which petitioner relies (Pet. 16-21) provide no support for his direct claim against the United States. All of those cases involve challenges to Rule 6(e) orders, either in the court which issued the order by way of motion to modify or revoke the order, or in another court by way of motion to suppress at a trial the use of evidence obtained under a Rule 6(e) order. None of them holds that Rule 6(e) provides a complaining target a private right of action against the United States for damages and injunctive relief.

2. The petition does not, in any event, present an issue warranting review by this Court. Petitioner has assumed that documents seized by IRS agents pursuant to a search warrant are "matters occurring before the grand jury," and are subject to the restrictions on disclosure contained in Rule 6(e), merely because the agent who initiated the search and seizure had also been assigned to assist an attorney for the government in conducting a grand jury investigation. Although the court of appeals found it unnecessary to address that assertion, the district court found that the documents obtained by the search warrant were not "matters occurring before the grand jury," and that the restrictions of Rule 6(e) were therefore "not implicated" by the disclosure (Pet. App. 26a).

It is well established that documents seized pursuant to a search warrant are not deemed to be "matters occurring before the grand jury" merely because the agent who obtained the warrant was assisting an attorney for the government in the conduct of a grand jury investigation. See *In re Grand Jury Subpoena: United States v. Under Seal*, 920 F.2d 235, 241 (4th Cir. 1990); *Anaya v. United States*, 815 F.2d 1373, 1378-1379 (10th Cir. 1987); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982). As these cases have held, the confidential "matters occurring before the grand jury" that are protected by Rule 6(e) are only those matters that would reveal what has transpired before the grand jury. The content of records seized pursuant to a search warrant would not disclose what had transpired during the grand jury investigation of petitioner. Because the confidentiality requirements of Rule 6(e) were thus simply not violated (Pet. App. 26a), this case provides no basis for this Court to review the scope of a district court's authority to remedy breaches of grand jury secrecy.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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